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Progress report of the Secretary-General on Ethiopia and Eritrea

Addendum

Observations of the Eritrea-Ethiopia Boundary Commission

Introduction

1. At the time of issuing to the demarcation team its first set of Demarcation Instructions, the Commission considers it opportune to offer the Parties certain Observations on the Commission's approach to the demarcation phase of its work in the light in particular of certain considerations advanced by the Parties in their comments of 24 January 2003. In doing so the Commission is mindful of the fact that it is not the practice of international tribunals to respond to comments upon, or criticisms of, their decisions. However, the unusual features of the present situation, in which the Boundary Commission is required to continue its work by demarcating the boundary but without provision for formal pleadings by the Parties or full oral hearings, make it desirable that the Commission's work in this respect be more fully explained. This will, the Commission believes, also be helpful in avoiding certain misunderstandings regarding the content and effect of the Commission's Delimitation Decision of 13 April 2002 ("Delimitation Decision") and regarding its tasks during the demarcation process.

2. In the Delimitation Decision, the Commission delimited the colonial treaty border between Eritrea and Ethiopia as prescribed by the mandate given to it by the Parties, namely, in accordance with the pertinent colonial treaties and applicable international law. Under the December 2000 Agreement "[t]he parties agree that the delimitation ... determination [. . .] of the Commission shall be final and binding." Both Parties have affirmed their acceptance of the Delimitation Decision.

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The Demarcation Phase

3. The Commission has now turned to the second phase of its work, the demarcation of the boundary. Since, as the Parties have expressly agreed, the Commission's Delimitation determination is "final", the demarcation has to be the demarcation on the ground *of the boundary as delimited in the Delimitation Decision*, not a variation of that boundary or the elaboration of some new boundary. This conclusion is reflected in paragraph 14A of the Commission's Demarcation Directions of 8 July 2002, which reads as follows:

> "Division of towns and villages
>
> A. The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties."

Although Ethiopia had, in its written comments on the draft of this provision, expressed the hope that it could be made more flexible so that demarcations could be more practical and mitigate hardships, the Commission felt unable to accede to that suggestion, given both the finality which the Parties were agreed was attached to its Delimitation Decision and the role given by the Parties to the United Nations in facilitating the resolution of such problems.

4. The position as set out in paragraph 14A thus follows from the mandate given to the Commission by the Parties in the December 2000 Agreement. The Commission cannot by its own actions expand the authority conferred upon it. If, however, the Parties were to agree that the Commission's authority should be expanded, they would be free to do so.

Flexibility in demarcation

5. At this point the Commission must address the question of the flexibility which is said to inhere in a demarcation process and which, it is suggested, enables the Commission to depart from the strict application of the boundary line which it prescribed in order to take into account the human and physical geography of certain areas better known now than at the time the Delimitation Decision was handed down.

6. The Commission is, as already noted, constrained by the terms of the December 2000 Agreement. The Commission is unable to read into that treaty language, either taken by itself or read in the light of the context provided by other associated agreements concluded between the Parties, any authority for it to add to or substract from the terms of the colonial treaties or to include within the applicable international law elements of flexibility which it does not already contain.

7. In this latter respect the Commission notes that there is a practice whereby demarcators may be given some latitude, on various grounds, in demarcating the line which has been delimited by some arbitral or judicial award or by a boundary treaty. But the Commission notes that this is a practice which is normally based on the agreement of the parties concerned, as expressed in some relevant instrument. Moreover, that practice often involves the demarcation of a boundary by joint demarcation teams composed of representatives of the two States concerned, who can thus act for their States in agreeing to such flexibility as the demarcation team may think appropriate in the course of its work. The Commission is not of the view that there is to be derived from that practice a settled rule of customary international law to the effect that demarcators not so expressly empowered nonetheless possess such power.

8. Hence, consistent with the Parties' prescription that the delimitation be final, the scope for any clarification of or deviation from the boundary which the Boundary Commission has laid down is very limited. In the Commission's view a demarcator must demarcate the boundary as it has been laid down in the delimitation instrument, but with a limited margin of appreciation enabling it to take account of any flexibility in the terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable.

9. In the present case this conclusion is the more compelling in the light of three considerations in particular to which the Parties had agreed in advance:

(a) first, they knew in advance, and agreed, that the result of the Commission's delimitation of the boundary might not be identical with previous areas of territorial administration and might follow a course which resulted in populations ending up on the "wrong" side of the boundary, and that where such a situation arose the ensuing problems were for resolution by the UN rather than by the Commission (Article 4.16 of the December 2000 Agreement);

(b) second, the Parties knew in advance, and agreed, that it was not open to the Commission to make its decisions on the basis of *ex aequo et bono* considerations (Article 4.2);

(c) third, the Parties knew in advance, and agreed, that the boundary as delimited by the Commission's Delimitation Decision would be final (Article 4.15), i.e., not subject to

amendment, including therefore amendment during the process devoted to and limited to demarcation of the boundary delimited.

Flexibility Within the Terms of the Delimitation Decision

10. In respect of certain matters – Tserona, Zalambessa, Bure, the Eastern Sector as a whole, rivers, the recalculation of coordinates, and the eventual need to replace the Commission's "illustrative" map with a final and definitive map – the Commission envisaged that further work was required but it specified in its Delimitation Decision what that work would entail. It would be wrong to read into those exact references some readiness or authority on the part of the Commission to go beyond the limits set, let alone to look again at other sections of the boundary in the light of such further representations as might be made to it.

(a) The recalculation of coordinates

11. This is particularly the case with the Commission's specification in the Delimitation Decision of the coordinates of the points between which the boundary was to run. The Commission explained that this particular specification was used because of the limited availability at that stage of information on the maps before the Commission. The Commission therefore added that "[a]ll coordinates will be recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information." As is evident from the words used and from their context the recalculation of the coordinates was to be solely for the purpose of ensuring, on the basis of aerial photography, which the Commission had previously been precluded from initiating, that the coordinates of the locations listed in the Decision were accurate. Nothing in the language used could reasonably be read as suggesting that the Commission intended that the locations themselves would be varied during the demarcation. It was to be a technical exercise not involving any substantive alteration in the boundary. Nothing was said in the Decision to suggest that the line was provisional other than in relation to the locations specifically identified in paragraph 10 above.

12. The Commission is therefore obliged to reject the assertion that it must adjust the coordinates to take into account the human and physical geography in the border region. Moreover, the

Commission firmly rejects the contention that if such adjustments are not made the Commission's work would be devoid of adequate legal basis.

(b) The Parties' subsequent conduct

13. Similarly, the fact that the Commission, in its Delimitation Decision, made an assessment of the effect of subsequent conduct on the boundaries established by the three colonial treaties cannot be read as enabling the Commission now to reopen the Delimitation Decision. In considering such conduct, the Commission relied on the evidence placed before it by the Parties during the written and oral pleadings before the Commission, and concluded that in some respects a departure from the treaty boundary was called for while in others it was not. The Commission's readiness to consider in that way the Parties' subsequent conduct was not intended to mean, and cannot be taken to mean, that the Commission would now be receptive to additional evidence of that conduct or would itself seek to gather it. To do so would mean that the boundary determined by the Commission would have been subject to further variation and would thus have been indeterminate. It would also be inconsistent with the stipulation in the December 2000 Agreement that the Commission's Delimitation Decision is "final." The boundary laid down in the Delimitation Decision reflects the Commission's assessment of the evidence of conduct presented by the Parties. The boundary line drawn, for example, in the area of the so-called Belesa and Endeli Projections is not a provisional line subject to further consideration by the Commission of new evidence of State practice in those areas. There is, in short, no further room for the introduction by the Parties of additional new evidence of their conduct, or for the Commission to seek out such evidence.

The Three Boundary Sectors

14. As the Commission indicated in its Delimitation Decision, its approach to the task of delimiting the boundary between Eritrea and Ethiopia was dictated by the December 2000 Agreement, in which the Parties stipulated that the Commission's mandate was to determine the boundary on the basis of the three Treaties and applicable international law. Accordingly, the Commission dealt with the boundary in three sectors corresponding to the three Treaties. As they were not identical in content, the interpretation and application of each by the Commission required different approaches in each of the sectors to which they related.

(a) The Western Sector

15. The boundary in the Western Sector, governed by the 1902 Treaty, was never completely laid down prior to the dispute between the Parties. It was, therefore, a principal task of the Commission to complete the delimitation of that boundary.

16. The Commission concluded that the boundary in the uncompleted section had crystallized by 1935 so as to follow a straight line between Points 6 and 9 as depicted on the map accompanying its Delimitation Decision. That straight line had been represented on many maps, including maps published by Ethiopia as well as Eritrea.

17. The Commission also examined developments after 1935, and concluded that it could "perceive nothing in that chain of developments that has had the effect of altering the boundary between the Parties" (para 5.91). The Commission observes that its finding that the boundary under the 1902 Treaty had by 1935 crystallized along the line of the traditional signature means that the burden rested upon Ethiopia to substantiate any claimed departure from that line on the basis of conduct that would serve to show that Badme village (which lies close to the line) was subject to Ethiopian control. The Commission referred specifically in the Delimitation Decision (paras 5.92-5.95) to the evidence produced by Ethiopia. It noted in particular that Ethiopia had introduced no evidence in its opening pleading (its Memorial) of governmental activities west of that straight line; although it produced some evidence in its Counter Memorial, it did not add to or develop this in its Reply. Moreover, maps submitted by Ethiopia were inconsistent as to the location of Badme village. Overall, the evidence was nothing like what might have been expected had Ethiopia's presence there in the period before the case been as significant as Ethiopia now alleges. The Commission would note that what is relevant here is governmental and not private activity. The references to Ethiopian governmental control of Badme and its environs were insufficient to persuade the Commission that an Ethiopian presence west of the line from Points 6 to 9 would support a departure from the line that had crystallized by 1935.

18. This conclusion followed from the inadequacy of Ethiopia's evidence. Since Badme village (as opposed to some other parts of the Badme region) lay on what was found to be the Eritrean side of the treaty line, there was no need for the Commission to consider any evidence of Eritrean

governmental presence there, although Eritrea did in fact submit such evidence. Moreover, even some maps submitted by Ethiopia not only showed the distinctive straight line between the Setit and Mareb Rivers, but also marked Badme village as being on the Eritrean side of that line. The Commission must also observe that the Ethiopian invocation of the findings of the OAU in respect of Badme in 1998 (Comment, para. 1.4, footnote 4) failed to mention the OAU's express statement that those findings did not "prejudge the final status of that area which will be determined at the end of the delimitation and demarcation process and, if necessary, through arbitration."

(b) The Central Sector

19. In the Central Sector the boundary was decided by reference, in the first place, to the Treaty of 1900. The subsequent conduct of the Parties was then examined with a view to determining whether any such conduct required the Commission to depart from the Treaty line as so determined. The Commission found that on the evidence placed before it such departure was required at a number of locations which were clearly described. However, at two points determination was left to be made more precise later, namely, at Tserona and Zalambessa. The Delimitation Decision contained no indication that the demarcation would involve any change or completion of the boundary at any other locations.

20. Nonetheless, in the light of further work done in the exercise of its demarcation function, the Commission has identified two areas in the Central Sector where a strict application of the line as delimited in its Delimitation Decision would be manifestly impracticable, namely, certain plateau lands in the vicinity of Point 18 on the boundary, and the area of the delta-like formation where the Ragali River flows into the Salt Lake. Demarcation instructions relating to these areas will be issued later.

21. In addition, the Commission is aware that there may be technical demarcation issues in part of the stretch between Points 17 and 18, where the boundary runs along what it referred to in the Delimitation Decision simply as the "Eritrean claim line." These issues will be addressed in future instructions to the demarcation team.

22. In two additional respects the Commission's delimitation of the boundary in the Central Sector may call for some clarification.

23. Although it now appears that the Commission may have been provided with insufficient information concerning the precise location of Fort Cadorna, this does not affect the delimitation of the boundary in the region that the Commission has identified as "Acran", that is, the area in the southern part of the Belesa Projection defined by the Commission as extending over the relevant part of the boundary line joining Points 14-18. The Commission found that the evidence of Eritrean activity was "sufficient . . . to justify treating the Acran region as part of Eritrea." That conclusion is not brought into question by the possible misplacement of Fort Cadorna, and accordingly there is no reason for the Commission to vary the boundary in the southern section of the Belesa Projection as delimited by it.

24. The other respect in which the Delimitation Decision calls for some clarification concerns the course of the boundary between Points 20 and 21, immediately to the southeast of Zalambessa. In that area there is a discrepancy between, on the one hand, the Commission's reasoning (at para. 4.42) and, on the other hand, its summary of the Treaty boundary (para. 4.59(6) and (7)) and the operative part of the Commission's *dispositif*, as shown on Map 11 of the Delimitation Decision. It is accepted as a matter of international law that it is the *dispositif* which is operative and binding, and which prevails if there is any discrepancy between it and the body of a tribunal's award.

25. There is a further issue in that the Commission, based upon map evidence submitted by both Parties, placed Point 20 at the source of a headwater stream of the Muna/Berbera Gado. From the aerial photo survey that the Commission was only recently permitted to conduct, it is apparent that that map evidence was inaccurate. There may therefore be some uncertainty regarding the boundary line around Zalambessa and the commencement of the line passing down the Muna until it meets the Enda Dashim at Point 21. The Commission will give the demarcation team appropriate instructions in due course.

(c) the Eastern Sector

26. The boundary in the Eastern Sector was governed by a third Treaty, that of 1908, which used the formula that the boundary should proceed parallel to the coast and at a distance of 60 kilometres from it, adding that the two Governments would fix the line on the ground by common accord, "adapting it to the nature and variation of the terrain." The Commission accordingly sought the views of the Parties as to what adaptations might be called for in accordance with that provision. In their comments of 24 January 2003, both Parties gave their views on this matter. The Commission has carefully considered those views, and has reached conclusions which it has embodied in the demarcation instructions which it has today given to the demarcation team.

Rivers and islands

27. The Commission also acknowledged in its Delimitation Decision that there could be certain practical difficulties in the demarcation of the boundary in those stretches where it follows the course of a river. It therefore asked both Parties for their views on these questions, which the Parties duly gave in their comments of 24 January 2003. The Commission is considering those views.

Concluding observations

28. It is inherent in any boundary delimitation that it may give rise to anomalies on the ground. This was expressly anticipated and accepted by the Parties in their December 2000 Agreement, and by the Commission in its Demarcation Directions of July 2002. This is essentially a matter for the Parties to deal with by agreement between themselves, or by agreeing to empower the Commission to vary the boundary, or by turning to the United Nations as contemplated in Article 4.16 of the December 2000 Agreement.

29. In its consideration of the comments of the Parties, the Commission must maintain its impartial approach to all matters with which it has to deal. It cannot allow one Party to claim for itself the right to insist on adjustment of parts of the boundary which that Party finds disadvantageous.

The Commission continues to owe a duty to both Parties to perform the functions placed upon it by their agreement and it is its intention to perform these functions fully and faithfully.

30. The next steps to be taken are clear: the Commission's surveyors must be allowed to continue, without hindrance, to establish the locations of the marker pillars and the contractors must be allowed to construct the pillars. The Parties must cooperate with the Commission in ensuring that the Commission be enabled to complete its work as set out in the Schedule of Operations. The Commission's personnel must be fully safeguarded in their operations. While the Commission notes with appreciation the firm undertakings that both Parties have given in this connection, it still remains for the Parties to discuss with the Chief Surveyor at an early date the details of the manner in which they propose to fulfill these undertakings.

London, 21 March 2003
Signed by the Commission:

(*Signed*) Sir Elihu **Lauterpacht**
President

(*Signed*) Prince **Bola Adesumbo Ajibola**

(*Signed*) W. Michael **Reisman**

(*Signed*) Judge Stephen M. **Schwebel**

(*Signed*) Sir Arthur **Watts**

(*Signed*) Dr. Hiroshi **Murakami**
Secretary

(*Signed*) Bette E. **Shifman**
Registrar